2008

Tracy Strauss v. David Tuschman : Brief of Appellant

Utah Court of Appeals

Maria L. Booth; Booth Law Office, P.C.; Attorney for Appellant.
Amy E. Hayes Kennedy; Dart, Adamson and Donovan; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

TRACY STRAUSS, Petitioner/Appellee, v. DAVID TUSCHMAN, Respondent/Appellant.	BRIEF OF APPELLANT DAVID TUSCHMAN

APPEAL FROM THE MEMORANDUM DECISION
AND FINAL ORDER OF THE THIRD DISTRICT COURT, SUMMIT COUNTY,
HONORABLE BRUCE C. LUBECK

Amy E. Hayes Kennedy
DART, ADAMSON & DONOVAN
370 E. South Temple, Suite 400
Salt Lake City, UT 84111
Attorneys for Appellee
Tracy Strauss

Maria L. Booth
BOOTH LAW OFFICE, P.C.
2041 Sidewinder Drive, Suite 2
Park City, UT 84060
Attorney for Appellant
David Tuschman

IN THE UTAH COURT OF APPEALS

TRACY STRAUSS,

Petitioner/Appellee,

v.

DAVID TUSCHMAN,

Respondent/Appellant.

BRIEF OF APPELLANT
DAVID TUSCHMAN

APPEAL FROM THE MEMORANDUM DECISION
AND FINAL ORDER OF THE THIRD DISTRICT COURT, SUMMIT COUNTY,
HONORABLE BRUCE C. LUBECK

Amy E. Hayes Kennedy
DART, ADAMSON & DONOVAN
370 E. South Temple, Suite 400
Salt Lake City, UT 84111
Attorneys for Appellee
Tracy Strauss

Maria L. Booth
BOOTH LAW OFFICE, P.C.
2041 Sidewinder Drive, Suite 2
Park City, UT 84060
Attorney for Appellant
David Tuschman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Bills

STATEMENT OF APPELLATE JURISDICTION

The Utah Court of Appeals has jurisdiction of this case pursuant to Sections 78-2a-3(2(h) of the Utah Code Annotated.

STATEMENT OF THE ISSUES

The following issues require consideration by the Court as a result of the March 26, 2008 Supplemental Decree of Divorce by the Honorable Bruce C. Lubeck, trial court judge. The ultimate legal question is whether Respondent should have visitation and visitation rights with his step daughter.

The issues to be resolved in this appeal are:

1. Did the trial court err in finding that the Respondent had no standing in his divorce proceedings to petition for visitation with his wife's child.

Standard of Review: The issue of whether the Respondent, as a step parent, has standing to petition for visitation is a matter of law, and is therefore subject to de novo review by the Court of Appeals using a correction of error standard.

Supporting Authority: *State v. Pena*, 869 P.2d 932 (Utah 1994); *Kessimakis v. Kessimakis*, 977 P.2d 1226 (Utah Ct. App. 1999).

2. If the Court erred in finding that the Respondent Stepfather did not have standing to petition for visitation with the minor child, then should the matter be remanded to the trial court for additional findings regarding the best interests of the child regarding visitation and child support?

Standard of Review: The issue of whether the Court should remand this case to the trial court for additional findings regarding the Respondent's visitation and the best interests of the child is dependent upon the Appeals Court's decision on whether the Respondent had standing to petition for visitation with his step daughter.

Supporting Authority: *Carlton v. Carlton*, 756 P.2d 86 (Utah App. 1988).

3. If the Court erred in finding that the Respondent Stepfather did not have standing to petition for visitation with the minor child, then should the matter be remanded to the trial court for additional findings regarding the Petitioner's contempt in refusing to follow the temporary order granting the Respondent visitation with the minor child?

Standard of Review: The issue of whether the Court should remand this case to the trial court for additional findings regarding the Petitioner's contempt in refusing to follow the temporary order is dependent upon the Appeals Court's decision on standing.

Supporting Authority: *Carlton v. Carlton*, 756 P. 2d 86 (Utah App. 1988).

PRESERVATION OF ISSUES ON APPEAL

The issue of the Respondent's standing to petition for visitation was preserved for appeal in the trial court. In his Answer and Counterclaim, the Respondent asserted his right to petition the court for visitation with his step daughter, Ruzele. (R. at 14 -18). Additionally, the issue of the Respondent's visitation was certified for trial by the district court commissioner as evidenced by the Pretrial Order signed on March 28, 2007 (R. at 380-382). The issue of the Petitioner's contempt was raised by the Respondent by motion,

and evidence regarding the Petitioner's contempt was presented at trial. The trial court judge addressed the Petitioner's contempt in his final ruling, which constitute the findings of fact and conclusions of law in this case (R. at 616).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, OR RULES

UTAH CODE ANN. § 30-3-5, attached in addendum.

STATEMENT OF THE CASE

This is an appeal from a decision of the lower court, Honorable Bruce C. Lubeck, finding that the Respondent, the step father of the minor child of the Petitioner, did not have standing to petition the court for visitation with his step daughter. The lower court based its findings on the decision of the Utah Supreme Court in Jones v. Barlow, 154 P.2d 808 (Utah 2007). The Jones v. Barlow decision was released after the Petition for Divorce had been filed, but prior to trial. Based on its decision that the Respondent did not have standing, the lower court declined to award the Respondent visitation with the minor child, and declined to punish the Petitioner for her contemptuous behavior.

The Utah Legislature passed the Custody and Visitation for Persons Other Than Parents Act in the 2008 Legislative session, in response to some uncertainties created by the Jones v. Barlow decision. The Act is not retroactive and is not available as a remedy to the Respondent.

STATEMENT OF RELEVANT FACTS

The statement of facts is based upon the record of this case in the pleadings of the parties, including memorandum and supporting addenda in the lower court.

1. Petitioner/Appellee Tracy Strauss ("Strauss") and Respondent/Appellant David Tuschman ("Tuschman") were married on July 20, 1996. (R. at 572).

2. At the time of their marriage, Strauss had a child, Ruzele, born January 7, 1994, prior to the marriage, from a biological father Robert Hayden ("Hayden"). (R. at 572).

3. Hayden and Strauss were never married. (R. at 572). Hayden did not know of Ruzele's existence and was told that Strauss had a miscarriage. (R. at 589).

4. After Strauss and Tuschman were married, Strauss and Ruzele moved to Texas to be with Tuschman. (R. at 572).

5. During the marriage the parties separated due to disagreements. (R. at 572).

6. Strauss moved to Park City, Utah with Ruzele and resided with Strauss' mother and sister. (R. at 572).

7. For a time after the separation, Tuschman remained in Texas working at his property management business. In July 2002 Tuschman and Strauss reconciled, moving in together. (R. at 572).

8. Tuschman and Strauss remained in contact during their periods of separation. While Tuschman was living in Texas, he would visit Strauss and Ruzele monthly, and Strauss and Ruzele traveled to Texas to visit Tuschman. Tuschman provided minimal

financial support to Strauss and Ruzele. (R. at 572-573). Tuschman also spoke with Ruzele by telephone. (R. at 586).

9. In July 2002 the parties and Ruzele moved into a Jeremy Ranch home and remained together until July 2003 when Strauss and Ruzele moved out and rejoined her mother and sister. (R. at 573). The parties reconciled again for a brief period in 2004. (R. at 573).

10. During the separations, Tuschman saw Ruzele and did things with her and for her. While the parties lived together, Tuschman also did things with and for Ruzele, including providing financial support. Tuschman participated with Ruzele in school and other activities. (R. at 573). Tuschman had a valuable relationship with the child, engaging in normal father-daughter activities. (R. at 586).

11. Tuschman utilized his trust funds to purchase the Jeremy Ranch home where he resided with Strauss and Ruzele. (R at 574).

12. During the marriage, Tuschman provided financial support to Strauss and Ruzele. From 2002 to 2004 the parties and the minor child lived completely off Tuschman's separate trust funds. (R. at 576).

13. Tuschman formed a strong bond of love and affection with Ruzele prior to the final separation of the parties in May 2004, which occurred when Ruzele was 10 years old. Tuschman supported Strauss and Ruzele in Utah through his trust funds. He sought to adopt Ruzele, but was rebuffed by Strauss, who would not consent to the adoption. (R. at 586).

14. Initially, after she filed for divorce, Strauss did not seek to halt Tuschman's visitation, and agreed in a hearing that he could have visitation. (R. at 586).

15. On July 6, 2005, the Court entered a Stipulation and Temporary Order Re: Motion for Temporary Restraining Order pursuant to Rule 65A pursuant to agreements reached by the parties at a hearing held on May 13, 2005. Strauss and Tuschman stipulated that Tuschman would have visitation with Ruzele one afternoon per week, and every other Friday overnight. (R. at 111).

16. Despite her previous agreements, Strauss later objected to visitation in a hearing held on June 30, 2005. Strauss claimed that Tuschman had no relationship with Ruzele. On July 19, 2005, the Court entered a Temporary Order finding that a relationship had been established between Tuschman and Ruzele, and that Tuschman was entitled to visitation. The court then set forth a visitation schedule for Tuschman and Ruzele and ordered that a visitation evaluation take place. (R. at 135 - 136).

17. Visitation still remained a problem. Tuschman sought a contempt finding, which was reserved for trial, and reunification counseling was ordered. (R. at 587).

18. Ruzele now verbalizes that she does not want to see Tuschman, does not want him part of her life, and that she wants to be involved with Robert Hayden, her biological father, introduced to her for the first time in 2005. (R. at 589).

19. Ruzele has been alienated from Tuschman by Strauss. Although the Court found that, at worst, Tuschman may have yelled at Ruzele and Strauss, the Court did not find that this behavior was reasonable or sufficient to cause the child to reject the only

father figure she had known. (R. at 587-588).

20. After the separation of the parties' and the filing of the divorce proceedings, but before Strauss took the position that Ruzele did not have a relationship with Tuschman, he enjoyed visitation with Ruzele without incident. There were no significant events in 2005 to the present that would justify Ruzele's changed attitude. (R. at 590).

21. Ruzele now views Tuschman as all evil and wrong, and cannot recall any fun or good times she had with him, despite clear evidence to the contrary in the form of pictures, notes and testimony which the Court heard as part of the evidence. (R. at 588).

22. During reunfication counseling, Ruzele indicated she did not want to be there, did not want to talk to Tuschman, and could not recall any good memories even when shown photographs of herself and Tuschman obviously enjoying good times in her younger years. (R. at 588).

23. Ruzele's attitude is attributable to Strauss' direct or covert negative attitudes toward Tuschman. Strauss chose Father's Day to tell Ruzele that Tuschman was not her real father and that she had a biological father named Robert Hayden. Although Ruzele and Hayden did not meet for several years after Ruzele was told of Hayden's identity, Strauss chose to take Ruzele to California to meet Hayden just at the time that visitation became most difficult for Tuschman. (R. at 589).

24. Ruzele states that her biological father Hayden is all good and she loves him, while reporting that Tuschman is all bad and evil and she wants nothing to do with him. There is no justification for these negative feelings other than Strauss' influence on the

child. (R. at 589).

25. Hayden had no role in the child's life until May 2005 and could not have had any role because Strauss told him she had miscarried. Hayden has had 5 physical visits with Ruzele, but has provided no financial support. (R. at 589).

26. The child's attitudes are based on feelings inculcated in Ruzele by Strauss and her family. The bond between Strauss and Ruzele is particularly close and strong and Strauss' views about Tuschman have, directly or covertly, been passed on to Ruzele. (R. at 591).

27. Strauss even testified that Tuschman tried to kill her when she accidentally overdosed on prescription medication because he did not call emergency personnel quickly enough after he discovered her in a largely comatose state. The Court did not find this account to be factual in any event. It is unknown whether Strauss' attitudes regarding this incident have been communicated to the child, but it may answer why the child feels she wants nothing to do with Tuschman. (R. at 591).

28. Strauss' feelings about Tuschman extend to an incident which occurred in March 2007 where the child ended the reunification session abruptly upon entering the session. The child left the room within moments of entering the room and within a minute, the child was getting into a car with her mother outside the office of the therapist. The pickup was clearly a planned event with Strauss waiting outside. (R. at 591-592).

29. The child's therapist testified that the child did not want to see Tuschman and that her wishes should be respected. The Trial Court found that many children do not

want to do necessary, day to day activities, but need to be compelled. In this instance, the Court found that it is in the child's best interests to realize that a relationship cannot be broken and discarded and other's feelings and emotions trampled upon. (R. at 593).

30. The Court also found that it would be in Ruzele's best interests that she be permitted to decide if she wants Tuschman in her life without undue or unfair interference from others. (R. at 593-594).

31. The Court further found that it would be in Ruzele's best interests to work through her conflicted feelings about Tuschman with the help of neutral persons. (R. at 594).

32. The Court appointed visitation evaluator, Dr. Anna Trupp, recommended that a guardian ad litem continue to be appointed for Ruzele's benefit, that Ruzele and Tuschman have contact several times a year, that Tuschman be permitted to communicate with Ruzele, and that Strauss and her family attend therapy. (Respondent's Trial Exhibit T, included in Addendum).

33. The Trial Court found that Dr. Anna Trupp was fair and unbiased in her investigation. (R. at 594).

34. Dr. Anna Trupp concluded that had it not been for Strauss' continued interference and poisoning of Ruzele's attitudes about Tuschman, they would continue to enjoy a health relationship. (Repondent's Trial Exhibit T, included in Addendum).

35. The Trial Court found that it is in Ruzele's best interests for the Respondent to have visitation with Ruzele. (R. at 606).

36. The Trial Court found that Tuschman, as a step parent, did not have standing to petition for visitation with his step daughter. (R. at 596).

37. The Trial Court found that although Strauss is the cause of the failure of visitation, there would be no purpose in punishing Strauss, and declined to find Strauss in contempt for failure to provide visitation according to the temporary orders. (R. at 616).

SUMMARY OF ARGUMENTS

The lower court erred in finding that the Respondent stepfather, David Tuschman did not have standing to under the statutes or common law to petition the court for visitation with the minor child Ruzele, because the Petitioner, the minor child's biological mother, had terminated the in loco parentis relationship between Tuschman and Ruzele. The lower court's decision should be reversed and the case remanded for further findings regarding visitation and the Petitioner's contempt.

ARGUMENT

1. The Trial Court Erred in Applying the Holdings in *Jones v. Barlow* to this Case and Finding that the Respondent Had No Legal Right to Seek or Obtain Visitation Because He is a Stepparent.

The lower court concluded "...as a legal determination the court rules it cannot and does not examine the best interest of the child as respondent has no legal right to seek or obtain visitation with a step child that has not been adopted." This holding is in direct conflict with the holdings of the Utah Supreme Court in *Jones v. Barlow*, 154 P.3d 808 (Utah 2007) and *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978).

The starting point for the lower court's analysis was whether Tuschman, having

married Strauss, had standing to petition for visitation with the minor child as a parent or "other member of the immediate family" under Utah Code Ann. § 30-3-5(5). The lower court stated "[O]nly if respondent has such standing would the court consider what is in the child's best interests." R. At p. 29.

The lower court then proceeded to rule that the *Jones* court modified *Gribble* when it determined that the in loco parentis relationship was temporary and terminable at will by the surrogate parent, the child, or the biological parent. Therefore, the lower court concluded that Tuschman did not stand in loco parentis to the child because Strauss terminated that relationship. Thus, Tuschman could not be considered a "parent" to petition for visitation under Utah Code § 30-3-5(5). This is where the lower court's analysis conflicts from the holdings in *Jones* and *Gribble*.

The lower court then went on to determine whether Tuschman could be considered an "immediate family member" under Utah Code Ann. § 30-3-5(5). The lower court analysed decisions in which Utah and other state courts have addressed the idea of "immediate family members," and concluded that in the context of visitation and custody, the term "immediate family member" should be defined in relationship to the child and not to the parent. Based on the foregoing, the lower court determined that "a third party must have some direct legal or biological relationship to the child, and not just to the parent of that child." Because Tuschman was not related to the child legally or biologically, he had no standing to petition for visitation.

The lower court's conclusion that a step parent has no standing to petition for

visitation in a divorce proceeding directly conflicts with the holdings in *Gribble v. Gribble* and *Jones v. Barlow*. Although the *Jones* court modified its holdings in *Gribble* as to the termination of the in loco parentis relationship, the Jones court clarified its holdings in *Gribble* as they relate to a step parent's standing to petition for visitation.

The Utah Supreme Court distinguished Jones' status as a domestic partner of Barlow from that of Gribble as stepfather and husband. In *Jones v. Barlow* the Court stated "Although this court recognized the right of stepparents to seek visitation in *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978), standing in that case arose out of an interpretation of statutory law granting such rights, not from an independent common law source. We decline to extend the common law doctrine of in loco parentis to create standing where it does not arise out of statute."

In *Gribble*, Appellant stepfather petitioned the divorce court for reasonable visitation with his wife's son. The stepfather had treated the child as his own, felt very close to him, and was concerned about the child's future welfare. He offered to provide support for the child's benefit. Appellant had lived with the child from the time he was two months old until the parties separation, four years later. The child had no contact with his biological father.

The lower court in *Gribble* held that the stepfather was not entitled to a hearing on visitation. The Utah Supreme Court held otherwise, finding that a step parent who stood "in loco parentis" to a child should be considered a "parent" for purposes of Utah Code Ann. § 30-3-5, thereby conferring jurisdiction on the lower court to determine whether it

is in the child's best interest to grant the step father a right of visitation.

The *Jones* Court was compelled to engage in a different analysis from the *Gribble* Court because Jones and Barlow were never married, and the Petitioner, Kerri Lynn Jones, was not a biological or adoptive parent to the child. Jones and Barlow held the status of "domestic partners," which is not a statutorily defined relationship in the State of Utah. Furthermore, Jones brought suit in district court seeking a "decree of custody and visitation," claiming standing under the in loco parentis doctrine, and not by virtue of any State statute. The *Jones* Court declined to confer standing on Jones by virtue of the common law in loco parentis doctrine, independent of any statutory provision.

In this case, the trial court applied the Jones holdings to the facts before it, stating that once Strauss had terminated the in loco parentis relationship, Tuschman lost any standing to petition for visitation with Ruzele. However, this application of the *Jones* holding is contrary to statements made by the Utah Supreme Court in *Jones*.

The *Jones* Court argued that *Gribble* based a stepparent's standing to seek visitation upon an interpretation of a Utah Divorce statute, Utah Code Ann. § 30-3-5(5)(a) which states that "visitation rights of parents, grandparents and other relatives shall take into consideration the welfare of the child." The *Jones* court then went on to say "We read this phrase to 'indicate[ ] the legislative intent to protect the relationships which affect the child whose parents are being divorced' and reasoned that an individual who 'stand[s] in the relationship of parent, grandparent or other relative' had standing under the statute to seek visitation." *Jones*, 154 P.3d at 814, citing *Gribble*, 583 P.2d at 66.

The *Jones* court stated that in *Gribble* it "used the in loco parentis doctrine as an 'interpretive tool' to guide the inquiry as to who stands in one of those relationships" *Id.* At 814. The court then found the analysis in *Gribble* to be inapplicable to the facts in Jones because Jones relied solely upon the common law for her standing. The Jones court added further distinction between Jones' status as domestic partner and that of Gribble as step father by saying "[F]inally, Jones is not proceeding under the divorce statutes as did the stepparent in *Gribble*." *Id*, at 815.

The trial court in this case departed from the Supreme Court's clear distinctions and simply found that Tuschman could not stand in loco parentis to the child because Strauss had terminated the in loco parentis relationship. Further, Tuschman, under the trial court's narrow analysis, was not an immediate family member, and therefore had no standing to petition for visitation with his step daughter.

This departure leads to an inequitable and damaging result. The trial court made its discomfort clear and stated "the court believes respondent SHOULD have visitation with this child. Had the court been required to analyze the facts with the best interest of the child in mind, as noted, the basic recommendations of the evaluator would largely have been adopted." (R. At page 38).

A more reasoned and consistent approach in interpreting the statutory language is to follow the guidance of the Utah Supreme Court in *Gribble v. Gribble*. In *Gribble* the Court stated that the 1975 amendment to Sec. 30-3-5 adding the phrase, "Visitation rights of parents, grandparents and other relatives shall take into consideration the welfare of the

child," was reflective of the Legislature's codification of "traditional common law rules permitting an equitable investigation into whether it is in the welfare of the child that parents, grandparents, or other relatives be accorded visitation rights." *Gribble*, 583 P.2d 64, at 66 (Utah 1978).

Like the step father in *Gribble,* the lower court found that Tuschman had treated Ruzele as his own, felt very close to her, had provided financial and emotional support to her, and had done typical father-daughter activities. Like the step father in *Gribble,* this Court should find that Tuschman has standing under the Utah divorce statute to petition the Court for visitation with Ruzele.

2. Utah Code Ann. § 30-3-5(5)(a) Confers Jurisdiction on the District Courts to Entertain a Stepparent's Petition for Visitation.

Utah statutes confer jurisdiction on the district courts of the State to enter a decree of dissolution of the marriage contract between a petitioner and a respondent. The divorce statutes also confer jurisdiction on the courts to enter orders regarding disposition of property and debts, custody and visitation of children, alimony, and other matters incident to the marriage contract of the parties to a divorce. Utah Code Ann. § 30-3-1, et. seq.

Utah Code Ann. § 30-3-5(1) states that "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties." The statute confers broad discretion on courts to use their equitable powers in entering orders regarding children incident to divorce proceedings.

Further, Utah Code Ann. § 30-3-5(5)(a) states that "In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interests of the child." The legislature modified the language of the statute in 1993, removing the phrase "relatives" and adding in its place "other immediate family members." In the same bill, the legislature also conferred visitation rights on grandparents in a separate statutory section. *See* 1993 Utah Laws 152.

Although the *Jones v. Barlow* court stated in a footnote that "We make no determination whether the *Gribble* interpretation of the prior version of Utah Code Section 30-3-5 applies to the slightly modified wording contained in the current version of the code[.]" the change cannot be construed to be a deprivation of the step parent standing conferred by *Gribble* because *Gribble*'s holding determined that the stepparent was a "parent" under the statute in part because of his in loco parentis status. Also, had the Legislature intended that result, it would not have let the statute stand as written for over 20 years.

The plain language of the statute, and the interpretation of that language by the Utah Court in *Gribble* and *Jones v. Barlow* supports a ruling that the statute confers standing on Tuschman to petition for visitation with his step daughter, Ruzele.

3. The Lower Court Erred in Finding that the Respondent Lacked Standing Because the In Loco Parentis Relationship Had Not Been Terminated Prior to the Filing of the Divorce.

The lower court determined that Tuschman could not achieve standing to petition for visitation with his step daughter as a "parent" under Utah Code Ann. § 30-3-5(5)(a)

because by the time of trial, Strauss had terminated the in loco parentis relationship. However, Strauss did not attempt to terminate the relationship until more than a year after filing for divorce. At the time of filing of the divorce, Tuschman had an intact in loco parentis relationship with the minor child, Ruzele. Furthermore, this relationship was preserved by a finding in the Court's temporary order entered on July 19, 2005, stating that "a relationship has been established between minor child, Ruzele Strauss, and her stepfather, Respondent, David Tuschman." As part of the temporary order, the Court found that Tuschman was entitled to visitation, and implemented a visitation schedule. (R at 135-136).

If this Court were to adopt the lower court's interpretation that jurisdiction once conferred by statute due to the existence of an in loco parentis relationship can be terminated at any time by termination of the underlying in loco parentis relationship, the results could be disastrous. The question must then be asked - would existing Decrees of Divorce or temporary orders containing visitation rights for step parents be immediately voidable by biological parents? Clearly Strauss thought so when she chose to violate the existing temporary orders in the case, with negative effects for both Tuschman and the minor child.

At trial, the Court found that Tuschman "was involved with and had a valuable relationship with the child, engaging in what the court will call normal father-daughter activities." (R at paragraph 16, page 18). The Court further identified that as time passed after the filing of the divorce, "visitation became increasingly rare and difficult to attain

for respondent because of petitioner's conduct." (R. at 586-587). It was further determined that Tuschman supported Strauss and Ruzele financially, and expected to pay child support for Ruzele. Clearly, Tuschman had an in loco parentis relationship with Ruzele prior to and after the filing of the divorce case.

Strauss did not object to Tuschman's visitation until June 2005, more than one year after the divorce petition was filed. By that time, Strauss had interfered with Tuschman's relationship with Ruzele, and made visitation visits very difficult. She had also introduced Ruzele to her biological father in an attempt to alienate Ruzele from Tuschman. (R at 589).

In both *Jones v. Barlow* and *Gribble*, the Utah Supreme Court utilized the in loco parentis doctrine to describe the type of relationship contemplated by the Utah Legislature in its codification of the rights of third parties to petition for visitation with a child. These third party rights were limited by the Legislature to actions brought pursuant to the divorce statute found at Utah Code Ann. § 30-3-1, et seq. The standing contemplated by both the *Jones* and the *Barlow* courts were for those proceedings brought under the divorce statute.

Similarly, this Court can determine that because the action was brought pursuant to the divorce statute, Tuschman had standing originally as a "parent" under the in loco parentis doctrine, which permits and in fact compels the lower court to engage in an analysis of the best interests of the child.

4. The Legislature Confirmed Its Original Intentions by Passing Legislation Conferring Standing on Stepparents to Petition for Visitation with Their Stepchildren.

In the 2008 legislative session, the Utah Legislature addressed the confusion caused by the *Jones v. Barlow* and *Gribble* decisions by passing the Custody and Visitation for Persons other than Parents Act, Utah Code Ann. § 30-5a-1, et. seq. (The "Act"). The Act permits a "person other than a parent" to file a petition with the juvenile or district courts, to establish custody or visitation with a child with whom they have intentionally assumed the role of a parent to the child. A current or former stepparent is listed as a "person other than a parent" with standing to petition under the Act. Unfortunately, the statute was not retroactive, and its effective date of May 5, 2008 did not permit the Respondent to utilize the provisions of the Act. Further, because of the decision rendered in this case, unless the lower court's holding is reversed by this Court, the Respondent is barred from seeking remedy under the Act.

5. The Lower Court Found it in the Best Interests of the Child, Ruzele, to Have a Relationship with her Stepfather, David Tuschman, and This Court Should Remand the Case for Further Findings Regarding that Relationship.

In its findings, the lower court engaged in a lengthy description of Tuschman's relationship with Ruzele, and the deterioration of that relationship due to Strauss' alienation. The lower court also considered the recommendations of the visitation evaluator, Dr. Anna Trupp, finding her to be fair and unbiased in her investigation. (R. at 594). The lower court stated that "[H]ad the court been required the analyze the facts

with the best interest of the child in mind, as noted, the basic recommendations of the evaluator would largely have been adopted." (R. at 606).

Dr. Anna Trupp recommended the court continue the appointment of a guardian ad litem, and that the guardian inform Ruzele of Tuschman's contact information and provide Ruzele with letters from Tuschman. Further, Dr. Trupp recommended that Strauss and her family work with a therapist to understand the effects of broken attachments on the child. Finally, Dr. Trupp recommended that Tuschman and Ruzele have four visits per year, in the presence of a therapist or the guardian. This, Dr. Trupp felt, would permit Ruzele to "enmesh or individuate from her maternal family without feeling pressured from both sides, and then be provided the opportunity to assess her feelings at a later time." (Respondent's Trial Exhibit T, included in Addendum).

It is clear from both the Court's findings and Dr. Trupp's report that denying a relationship between Ruzele and Tuschman is not in Ruzele's best interests, and could be harmful to her future development. If this Court finds that Tuschman has standing to petition for visitation with Ruzele, the Court should remand the case for adequate and complete findings of fact and conclusions of law as to the visitation to be ordered in the case.

6. This Court Should Remand the Case for Further Findings Regarding the Contempt of Petitioner Because the Lower Court Found that although Petitioner Failed to Follow the Temporary Orders, Punishing the Petitioner for Contempt Would Have No Meaning Because of the Respondent's Lack of Standing to Petition for Visitation.

Tuschman sought a contempt finding from the lower court that Strauss had failed to comply with the temporary orders regarding visitation. The issue of contempt was reserved for trial. At trial, the lower court determined that Strauss had alienated Ruzele from her stepfather, and that Strauss was the cause of Ruzele's attitudes towards Tuschman, and the cause of the failure of visitation. (R. at 616).

Despite the lower courts findings, it determined that "there would be no purpose in 'punishing' petitioner at this point. Any theory of punishment, retribution or specific deterrence, has no meaning in this context as this will not be repeated." (R. at 616).

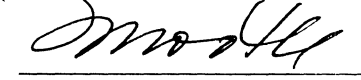
If this Court finds that Tuschman has standing to petition for visitation then remanding the case for further findings regarding contempt, and sanctions, would be meaningful and appropriate because it would discourage Strauss from disobeying future court orders.

CONCLUSION

Based on the foregoing, this Court should reverse the lower court's ruling and remand the case for further findings regarding visitation and contempt.

DATED this 28 day of November, 2008.

BOOTH LAW OFFICE, P.C.



Maria L. Booth
Attorney for Appellant/Respondent

CERTIFICATE OF SERVICE

I certify that on the 28 day of November, 2008, I delivered a copy of the foregoing BRIEF OF APPELLANT by mailing the same via first class postage prepaid to:

Amy E. Hayes Kennedy
DART, ADAMSON & DONOVAN
370 E. South Temple, Suite 400
Salt Lake City, UT 84111
Attorneys for Appellee
Tracy Strauss

IN THE UTAH COURT OF APPEALS

TRACY STRAUSS,

Petitioner/Appellee,

v.

DAVID TUSCHMAN,

Respondent/Appellant.

BRIEF OF APPELLANT
DAVID TUSCHMAN

APPEAL FROM THE MEMORANDUM DECISION
AND FINAL ORDER OF THE THIRD DISTRICT COURT, SUMMIT COUNTY,
HONORABLE BRUCE C. LUBECK

Amy E. Hayes Kennedy
DART, ADAMSON & DONOVAN
370 E. South Temple, Suite 400
Salt Lake City, UT 84111
Attorneys for Appellee
Tracy Strauss

Maria L. Booth
BOOTH LAW OFFICE, P.C.
2041 Sidewinder Drive, Suite 2
Park City, UT 84060
Attorney for Appellant
David Tuschman